

LEGISLATIVE BILL 690

Approved by the Governor May 26, 2011

Introduced by Brasch, 16; Bloomfield, 17; Carlson, 38; Christensen, 44; Fulton, 29; Hansen, 42; Heidemann, 1; Janssen, 15; Krist, 10; Langemeier, 23; Larson, 40; Lautenbaugh, 18; McCoy, 39; Schilz, 47; Schumacher, 22; Smith, 14; Wallman, 30.

FOR AN ACT relating to abortion; to amend sections 64-113, 71-6901, 71-6902, 71-6903, 71-6904, 71-6905, 71-6906, 71-6907, and 71-6908, Reissue Revised Statutes of Nebraska, and section 38-2021, Revised Statutes Cumulative Supplement, 2010; to change provisions relating to consent and parental notification; to provide and change penalties; to require reports; to provide for confidentiality of declarations; to redefine malfeasance in office for notaries public; to harmonize provisions; to provide severability; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 38-2021, Revised Statutes Cumulative Supplement, 2010, is amended to read:

38-2021 Unprofessional conduct means any departure from or failure to conform to the standards of acceptable and prevailing practice of medicine and surgery or the ethics of the profession, regardless of whether a person, patient, or entity is injured, or conduct that is likely to deceive or defraud the public or is detrimental to the public interest, including, but not limited to:

(1) Performance by a physician of an abortion as defined in subdivision (1) of section 28-326 under circumstances when he or she will not be available for a period of at least forty-eight hours for postoperative care unless such postoperative care is delegated to and accepted by another physician;

(2) Performing an abortion upon a minor without having satisfied the ~~notice~~ requirements of sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act;

(3) The intentional and knowing performance of a partial-birth abortion as defined in subdivision (7) of section 28-326, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself; and

(4) Performance by a physician of an abortion in violation of the Pain-Capable Unborn Child Protection Act.

Sec. 2. Section 64-113, Reissue Revised Statutes of Nebraska, is amended to read:

64-113 (1) Whenever charges of malfeasance in office are preferred to the Secretary of State against any notary public in this state, or whenever the Secretary of State has reasonable cause to believe any notary public in this state is guilty of acts of malfeasance in office, the Secretary of State may appoint any disinterested person, not related by consanguinity to either the notary public or person preferring the charges, and authorized by law to take testimony of witnesses by deposition, to notify such notary public to appear before him or her on a day and at an hour certain, after at least ten days from the day of service of such notice. Such appointee may summon witnesses, in the manner provided by section 64-108, to appear at the time specified in the notice, and he or she may take the testimony of such witnesses in writing, in the same manner as is by law provided for taking depositions, and certify the same to the Secretary of State. The notary public may appear, at such time and place, and cross-examine witnesses and produce witnesses in his or her behalf, which cross-examination and testimony shall be likewise certified to the Secretary of State. Upon the receipt of such examination, duly certified in the manner prescribed for taking depositions to be used in suits in the district courts of this state, the Secretary of State shall examine the same, and if therefrom he or she is satisfied that the charges are substantially proved, he or she may remove the person charged from the office of notary public or temporarily revoke such person's commission. Within fifteen days after such removal or revocation and notice thereof, such notary public shall deposit, with the Secretary of State, the commission as notary public and notarial seal. The commission shall be canceled or temporarily revoked by the Secretary of State. A person so removed from office shall be forever disqualified from holding the office of notary public. A

person whose commission is temporarily revoked shall be returned his or her commission and seal upon completion of the revocation period and passing the examination described in section 64-101.01. The fees for taking such testimony shall be paid by the state at the same rate as fees for taking depositions by notaries public. The failure of the notary public to deposit his or her commission and seal with the Secretary of State as required by this section shall subject him or her to a penalty of one thousand dollars, to be recovered in the name of the state.

(2) For purposes of this section, malfeasance in office means, while serving as a notary public, (a) failure to follow the requirements and procedures for notarial acts provided for in Chapter 64, articles 1 and 2, ~~or~~ ~~(b)~~ (b) violating the confidentiality provisions of section 15 of this act, or ~~(c)~~ (c) being convicted of a felony or other crime involving fraud or dishonesty.

Sec. 3. Section 71-6901, Reissue Revised Statutes of Nebraska, is amended to read:

71-6901 For purposes of sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act:

~~(1) Abortion shall mean an act, procedure, device, or prescription administered to a woman known by the person so administering to be pregnant and administered with the intent and result of producing the premature expulsion, removal, or termination of the human life within the womb of the pregnant woman, except that in cases in which the unborn child's viability is threatened by continuation of the pregnancy, early delivery after viability shall not be construed as an abortion;~~

~~(2) Facsimile copy shall mean a copy generated by a system that encodes a document or photograph into electrical signals, transmits those signals over telecommunications lines, and then reconstructs the signals to create an exact duplicate of the original document at the receiving end;~~

~~(3) Parent shall mean one parent or guardian of the pregnant woman selected by the pregnant woman. The attending physician shall certify in writing in the pregnant woman's medical record the parent or guardian selected by the woman;~~

~~(4) Physician or attending physician shall mean the physician intending to perform the abortion; and~~

~~(5) Pregnant woman shall mean an unemancipated woman under eighteen years of age who is pregnant or a pregnant woman for whom a guardian has been appointed pursuant to sections 30-2620 to 30-2629 because of a finding of incapacity, disability, or incompetency.~~

(1) Abortion means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:

(a) Save the life or preserve the health of an unborn child;

(b) Remove a dead unborn child caused by a spontaneous abortion; or

(c) Remove an ectopic pregnancy;

(2) Coercion means restraining or dominating the choice of a pregnant woman by force, threat of force, or deprivation of food and shelter;

(3) Consent means a declaration acknowledged before a notary public and signed by a parent or legal guardian of the pregnant woman or an alternate person as described in section 5 of this act declaring that the principal has been informed that the pregnant woman intends to undergo a procedure pursuant to subdivision (1) of section 71-6901 and that the principal consents to the procedure;

(4) Department means the Department of Health and Human Services;

(5) Emancipated means a situation in which a person under eighteen years of age has been married or legally emancipated;

(6) Facsimile copy means a copy generated by a system that encodes a document or photograph into electrical signals, transmits those signals over telecommunications lines, and then reconstructs the signals to create an exact duplicate of the original document at the receiving end;

(7) Incompetent means any person who has been adjudged a disabled person and has had a guardian appointed under sections 30-2617 to 30-2629;

(8) Medical emergency means a condition that, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function;

(9) Physician means any person licensed to practice medicine in this state as provided in the Uniform Credentialing Act. Physician includes a person who practices osteopathy; and

(10) Pregnant woman means an unemancipated woman under eighteen years of age who is pregnant or a woman for whom a guardian has been appointed pursuant to sections 30-2617 to 30-2629 because of a finding of incapacity, disability, or incompetency who is pregnant.

Sec. 4. Section 71-6902, Reissue Revised Statutes of Nebraska, is amended to read:

71-6902 ~~(1) No abortion shall be performed upon a pregnant woman until at least forty-eight hours after written notice of the pending abortion has been delivered in the manner specified in subsection (2) or (3) of this section.~~

~~(2) The notice shall be addressed to the parent at his or her usual place of residence and shall be delivered personally to the parent by the physician or an agent.~~

~~(3) In lieu of the delivery required by subsection (2) of this section, notice shall be made by registered or certified mail addressed to the parent at his or her usual place of residence with return receipt requested and restricted delivery to the addressee, which means the postal employee can only deliver mail to the authorized addressee. Time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place subsequent to the mailing.~~

Except in the case of a medical emergency or except as provided in sections 71-6903 and 71-6906 and section 5 of this act, no person shall perform an abortion upon a pregnant woman unless, in the case of a woman who is less than eighteen years of age, he or she first obtains the notarized written consent of both the pregnant woman and one of her parents or a legal guardian or, in the case of a woman for whom a guardian has been appointed pursuant to sections 30-2617 to 30-2629, he or she first obtains the notarized written consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only his or her child's or ward's best interest.

Sec. 5. If the pregnant woman declares in a signed written statement that she is a victim of abuse as defined in section 28-351, sexual abuse as defined in section 28-367, or child abuse or neglect as defined in section 28-710 by either of her parents or her legal guardians, then the attending physician shall obtain the notarized written consent required by section 71-6902 from a grandparent specified by the pregnant woman. The physician who intends to perform the abortion shall certify in the pregnant woman's medical record that he or she has received the written declaration of abuse or neglect. Any physician relying in good faith on a written statement under this section shall not be civilly or criminally liable under sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act for failure to obtain consent. If such a declaration is made, the attending physician or his or her agent shall inform the pregnant woman of his or her duty to notify the proper authorities pursuant to sections 28-372 and 28-711.

Sec. 6. No parent, guardian, or any other person shall coerce a pregnant woman to obtain an abortion. If a pregnant woman is denied financial support by her parents, guardians, or custodians due to her refusal to obtain an abortion, the pregnant woman shall be deemed emancipated for purposes of eligibility for public assistance benefits, except that such benefits may not be used to obtain an abortion.

Sec. 7. Section 71-6903, Reissue Revised Statutes of Nebraska, is amended to read:

71-6903 (1) The requirements and procedures under this section are available to pregnant women whether or not they are residents of this state.

~~(1) (2) If a pregnant woman elects not to notify her parent, obtain the consent of her parents or guardians, a judge of a district court, separate juvenile court, or county court sitting as a juvenile court shall, upon petition or motion and after an appropriate hearing, authorize a physician to perform the abortion if the court determines by clear and convincing evidence that the pregnant woman is both sufficiently mature and capable of giving informed consent to the proposed abortion. If the court determines that the pregnant woman is not mature or if the pregnant woman does not claim to be mature, the court shall determine whether the performance of an abortion upon her without notification of her parent would be in her best interests and shall authorize a physician to perform the abortion without such notification if the court concludes that the best interests of the pregnant woman would be served thereby.~~ well-informed to decide whether to have an abortion. If the court does not make the finding specified in this subsection or subsection (3) of this section, it shall dismiss the petition.

(3) If the court finds, by clear and convincing evidence, that there is evidence of abuse as defined in section 28-351, sexual abuse as defined in section 28-367, or child abuse or neglect as defined in section 28-710 of

the pregnant woman by a parent or a guardian or that an abortion without the consent of a parent or a guardian is in the best interest of the pregnant woman, the court shall issue an order authorizing the pregnant woman to consent to the performance or inducement of an abortion without the consent of a parent or a guardian. If the court does not make the finding specified in this subsection or subsection (2) of this section, it shall dismiss the petition.

~~(2)~~ (4) A facsimile copy of the petition or motion may be transmitted directly to the court for filing. If a facsimile copy is filed in lieu of the original document, the party filing the facsimile copy shall retain the original document for production to the court if requested to do so.

~~(3)~~ (5) A court shall not be required to have a facsimile machine nor shall the court be required to transmit orders or other material to attorneys or parties via facsimile transmission.

~~(4)~~ Am (6) The pregnant woman may commence an action for waiver of notification shall be commenced the consent requirement by the filing of a petition or motion personally, by mail, or by facsimile on a form provided by the State Court Administrator.

(7) The State Court Administrator shall develop the petition form and accompanying instructions on the procedure for petitioning the court for a waiver of ~~notification,~~ consent, including the name, address, telephone number, and facsimile number of each court in the state. A sufficient number of petition forms and instructions shall be made available in each courthouse in such place that members of the general public may obtain a form and instructions without requesting such form and instructions from the clerk of the court or other court personnel. The clerk of the court shall, upon request, assist in completing and filing the petition for waiver of ~~notification.~~ consent.

~~(5)~~ (8) Proceedings in court pursuant to this section shall be confidential and shall ensure the anonymity of the pregnant woman. The pregnant woman shall have the right to file her petition in the court using a pseudonym or using solely her initials. Proceedings shall be held in camera. Only the pregnant woman, the pregnant woman's guardian ad litem, the pregnant woman's attorney, and a person whose presence is specifically requested by the pregnant woman, ~~the pregnant woman's guardian ad litem,~~ or the pregnant woman's attorney may attend the hearing on the petition. All testimony, all documents, all other evidence presented to the court, the petition and any order entered, and all records of any nature and kind relating to the matter shall be sealed by the clerk of the court and shall not be open to any person except upon order of the court for good cause shown. A separate docket for the purposes of this section shall be maintained by the clerk of the court and shall likewise be sealed and not opened to inspection by any person except upon order of the court for good cause shown.

~~(6)~~ (9) A pregnant woman who is subject to this section may participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem for her. The court shall advise the pregnant woman that she has a right to court-appointed counsel and shall, upon her request, provide her with such counsel. Such counsel shall receive a fee to be fixed by the court and to be paid out of the treasury of the county in which the proceeding was held.

~~(7)~~ (10) Proceedings in court pursuant to this section shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay to serve the best interests interest of the pregnant woman. In no case shall the court fail to rule within seven calendar days from the time the petition is filed. If the court fails to rule within the required time period, the pregnant woman may file an application for a writ of mandamus with the Supreme Court. If cause for a writ of mandamus exists, the writ shall issue within three days. ~~If the judge issues a ruling adverse to the pregnant woman, the judge shall issue written findings of fact and conclusions of law.~~

~~(8)~~ (11) The court shall issue a written order which shall be provided immediately to the pregnant woman, the pregnant woman's guardian ad litem, the pregnant woman's attorney, or any other person designated by the pregnant woman to receive the order, which includes specific factual findings and legal conclusions supporting its decision which shall be provided immediately to the pregnant woman, the pregnant woman's guardian ad litem, the pregnant woman's attorney, and any other person designated by the pregnant woman to receive the order. Further, the court shall order that a confidential record of the evidence and the judge's findings and conclusions be maintained. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the pregnant woman.

Sec. 8. Section 71-6904, Reissue Revised Statutes of Nebraska, is amended to read:

71-6904 (1) An appeal to the Supreme Court shall be available to any pregnant woman for whom a court denies an order authorizing an abortion without ~~notification.~~ consent. An order authorizing an abortion without ~~notification~~ consent shall not be subject to appeal.

(2) An adverse ruling by the court may be appealed to the Supreme Court.

(3) A pregnant woman may file a notice of appeal of any final order to the Supreme Court. The State Court Administrator shall develop the form for notice of appeal and accompanying instructions on the procedure for an appeal. A sufficient number of forms for notice of appeal and instructions shall be made available in each courthouse in such place that members of the general public can obtain a form and instructions without requesting such form and instructions from the clerk of the court or other court personnel.

(4) The clerk of the court shall cause the court transcript and bill of exceptions to be filed with the Supreme Court within four business days, but in no event later than seven calendar days, from the date of the filing of the notice of appeal.

(5) In all appeals under this section the pregnant woman shall have the right of a confidential and expedited appeal and the right to counsel at the appellate level if not already represented. Such counsel shall be appointed by the court and shall receive a fee to be fixed by the court and to be paid out of the treasury of the county in which the proceeding was held. The pregnant woman shall not be required to appear.

(6) The Supreme Court shall hear the appeal de novo on the record and issue a written decision which shall be provided immediately to the pregnant woman, the pregnant woman's guardian ad litem, the pregnant woman's attorney, or any other person designated by the pregnant woman to receive the order.

(7) The Supreme Court shall rule within seven calendar days from the time of the docketing of the appeal in the Supreme Court.

(8) The Supreme Court shall adopt and promulgate rules to ensure that proceedings under this section are handled in a confidential and expeditious manner.

Sec. 9. Section 71-6905, Reissue Revised Statutes of Nebraska, is amended to read:

71-6905 No filing fees or costs shall be required of any pregnant woman at either the trial or appellate level for any proceedings pursuant to sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act.

Sec. 10. Section 71-6906, Reissue Revised Statutes of Nebraska, is amended to read:

71-6906 ~~Notification~~ Consent shall not be required pursuant to sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act if any of the following conditions exist:

(1) ~~The attending physician certifies in writing in the pregnant woman's medical record that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and there is insufficient time to provide the required notification;~~

(2) ~~The abortion is authorized in writing by the person who is entitled to notification; or~~

(3) ~~The pregnant woman declares that she is a victim of abuse as defined in section 28-351, sexual abuse as defined in section 28-367, or child abuse or neglect as defined in section 28-710. Notice of such a declaration shall be made to the proper authorities as provided in sections 28-372 and 28-711. If such a declaration is made, the attending physician or his or her agent shall inform the pregnant woman of his or her duty to notify the proper authorities as provided in sections 28-372 and 28-711.~~

(1) The attending physician certifies in the pregnant woman's medical record that a medical emergency exists and there is insufficient time to obtain the required consent; or

(2) Consent is waived under section 71-6903.

Sec. 11. Section 71-6907, Reissue Revised Statutes of Nebraska, is amended to read:

71-6907 (1) Any physician or attending physician who knowingly and intentionally or with reckless disregard performs an abortion in violation of sections 71-6901 to 71-6906 and sections 5, 6, 12, 14, and 15 of this act shall be guilty of a Class III misdemeanor.

(2) Performance of an abortion in violation of such sections shall be grounds for a civil action by a person wrongfully denied ~~notification.~~ the right and opportunity to consent.

(3) A person shall be immune from liability under such sections

(a) if he or she establishes by written evidence that he or she relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with such sections are bona fide and true, ~~(b) if the person has attempted with reasonable diligence to deliver notification as required by section 71-6902 but has been unable to do so, or~~ (c) (b) if the person has performed an abortion authorized by a court order issued pursuant to section 71-6903 or 71-6904.

(4) Any person not authorized to provide consent under sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act who provides consent is guilty of a Class III misdemeanor.

(5) Any person who coerces a pregnant woman to have an abortion is guilty of a Class III misdemeanor.

Sec. 12. A monthly report indicating only the number of consents obtained under sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act, the number of times in which exceptions were made to the consent requirement under such sections, the type of exception, the pregnant woman's age, and the number of prior pregnancies and prior abortions of the pregnant woman shall be filed by the physician with the department on forms prescribed by the department. The name of the pregnant woman shall not be used on the forms. A compilation of the data reported shall be made by the department on an annual basis and shall be available to the public.

Sec. 13. Section 71-6908, Reissue Revised Statutes of Nebraska, is amended to read:

71-6908 The Legislature recognizes and hereby declares that some teenage pregnancies are a direct or indirect result of family or foster family abuse, neglect, or sexual assault. The Legislature further recognizes that the actions of abuse, neglect, or sexual assault are crimes regardless of whether they are committed by strangers, acquaintances, or family members. The Legislature further recognizes the need for a ~~parent or guardian notification~~ parental consent bypass system as set out in section 71-6903 due to the number of unhealthy family environments in which some pregnant women reside. The Legislature encourages county attorneys to prosecute persons accused of committing acts of abuse, incest, neglect, or sexual assault pursuant to sections 28-319, 28-319.01, 28-320, 28-320.01, 28-703, and 28-707 even if the alleged crime is committed by a biological or adoptive parent, foster parent, or other biological, adoptive, or foster family member.

Sec. 14. (1) Nothing in sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act shall be construed as creating or recognizing a right to abortion.

(2) It is not the intent of sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act to make lawful an abortion that is currently unlawful.

Sec. 15. A declaration under sections 71-6901 to 71-6908 and sections 5, 6, 12, 14, and 15 of this act shall be confidential except as would be required in any court proceedings under such sections.

Sec. 16. If any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words be declared unconstitutional.

Sec. 17. Original sections 64-113, 71-6901, 71-6902, 71-6903, 71-6904, 71-6905, 71-6906, 71-6907, and 71-6908, Reissue Revised Statutes of Nebraska, and section 38-2021, Revised Statutes Cumulative Supplement, 2010, are repealed.